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June 8, 2009

Via: E-File

U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, California 94103-1526

Re: Nordyke, et al., v. King, et al., Case No.: 07-15763
Pending Case – Filed April 20, 2009.
En Banc Vote Pending pursuant to May 18, 2009 Order.
Original Panel: Arthur L. Alarcon, Diarmuid F. O'Scannlain and Ronald M. Gould

Your Honors:

This letter is intended to comply with Federal Rule of Appellate Procedure 28(j). A significant opinion regarding Second Amendment Incorporation has been filed in the Seventh Circuit Court of Appeals. The case is *National Rifle Association of America, Inc., et al., v. City of Chicago, Illinois and Village of Oak Park, Illinois*. Case Nos.: 08-4241, 08-4243 & 08-4244. The nine (9) page opinion is attached. (Encl: #1)

The Seventh Circuit panel ignored (or disregarded) the critical word "**required**" that was set forth in the now-famous footnote 23 in *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. at 2813 (2008):

> With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry **required** by our later cases. [...] (emphasis added)

Thus the Seventh Circuit's argument degenerates into: *"We can ignore Supreme Court precedent in order to uphold Supreme Court precedent."*

Of course *Duncan v. Louisiana*, 391 U.S. 145 (1968) was filed decades after *Cruikshank (1875)* [no direct application], *Presser (1886)* [no direct application] and *Miller (1894)* [no application through the privileges and immunity clause]. As *Duncan* is the later case, it is the controlling authority for Fourteenth Amendment due process analysis regarding incorporation of fundamental rights.

The Seventh Circuit is also wrong about its role as an intermediate court of appeals. At some point in the progress of our republic, the Supreme Court will have had something to say about every clause of the Constitution. If the intermediate appellate courts can not take into account later Supreme Court opinions that undermine the holdings of ancient cases, then at some point those intermediate courts of appeal will be out of a job – when it comes to interpreting the Constitution.

The better practice would be the one outlined by Professor Nelson Lund in his article: Anticipating Second Amendment Incorporation: The Role of the Inferior Courts. Syacuse Law Review, Vol. 59: 185. That article is attached for the Court's convenience. (Encl: #2)

Respectfully Submitted,

/s/

Donald Kilmer
Attorney for Appellants

encl: Opinion
Law Review Article

Enclosure #1

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 08-4241, 08-4243 & 08-4244

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ILLINOIS, and
VILLAGE OF OAK PARK, ILLINOIS,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 08 C 3645 *et al.*—**Milton I. Shadur**, *Judge.*

ARGUED MAY 26, 2009—DECIDED JUNE 2, 2009

Before EASTERBROOK, *Chief Judge*, and BAUER and POSNER, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Two municipalities in Illinois ban the possession of most handguns. After the Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), that the second amendment entitles people to keep

handguns at home for self-protection, several suits were filed against Chicago and Oak Park. All were dismissed on the ground that *Heller* dealt with a law enacted under the authority of the national government, while Chicago and Oak Park are subordinate bodies of a state. The Supreme Court has rebuffed requests to apply the second amendment to the states. See *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894). The district judge thought that only the Supreme Court may change course. 2008 U.S. Dist. LEXIS 98134 (N.D. Ill. Dec. 4, 2008).

Cruikshank, *Presser*, and *Miller* rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), holds that the privileges and immunities clause does not apply the Bill of Rights, en bloc, to the states. Plaintiffs respond in two ways: first they contend that *Slaughter-House Cases* was wrongly decided; second, recognizing that we must apply that decision even if we think it mistaken, plaintiffs contend that we may use the Court's "selective incorporation" approach to the second amendment. *Cruikshank*, *Presser*, and *Miller* did not consider that possibility, which had yet to be devised when those decisions were rendered. Plaintiffs ask us to follow *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), which concluded that *Cruikshank*, *Presser*, and *Miller* may be bypassed as fossils. (*Nordyke* applied the second amendment to the states but held that local governments may exclude weapons from public buildings and parks.) Another court of appeals has concluded that *Cruikshank*, *Presser*, and *Miller* still control even though their reasoning is obsolete.

Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009). We agree with *Maloney*, which followed our own decision in *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Cruikshank*, *Presser*, and *Miller* have "direct application in [this] case". Plaintiffs say that a decision of the Supreme Court has "direct application" only if the opinion expressly considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Anyone who doubts that *Cruikshank*, *Presser*, and *Miller* have "direct application in [this] case" need only read footnote 23 in *Heller*. It says that *Presser* and *Miller* "reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government." 128 S. Ct. at 2813

n.23. The Court did not say that *Cruikshank*, *Presser*, and *Miller* rejected a particular *argument* for applying the second amendment to the states. It said that they hold "that the Second Amendment applies only to the Federal Government." The Court added that "*Cruikshank*'s continuing validity on incorporation" is "a question not presented by this case". *Ibid*. That does not license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision.

State Oil Co. v. Khan, 522 U.S. 3 (1997), illustrates the proper relation between the Supreme Court and a court of appeals. After *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), held that antitrust laws condemn all vertical maximum price fixing, other decisions (such as *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)) demolished *Albrecht*'s intellectual underpinning. Meanwhile new economic analysis showed that requiring dealers to charge no more than a prescribed maximum price could benefit consumers, a possibility that *Albrecht* had not considered. Thus by the time *Khan* arrived on appeal, *Albrecht*'s rationale had been repudiated by the Justices, and new arguments that the *Albrecht* opinion did not mention strongly supported an outcome other than the one that *Albrecht* announced. Nonetheless, we concluded that only the Justices could inter *Albrecht*. See *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996). By plaintiffs' lights, we should have treated *Albrecht* as defunct and reached what we

deemed a better decision. Instead we pointed out *Albrecht*'s shortcomings while enforcing its holding. The Justices, who overruled *Albrecht* in a unanimous opinion, said that we had done exactly the right thing, "for it is this Court's prerogative alone to overrule one of its precedents." 522 U.S. at 20. See also, e.g., *Eberhart v. United States*, 546 U.S. 12 (2005).

What's more, the proper outcome of this case is not as straightforward as the outcome of *Khan*. Although the rationale of *Cruikshank*, *Presser*, and *Miller* is defunct, the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this. See Akhil Reed Amar, *America's Constitution: A Biography* 390–92 (2005) (discussing how the second amendment relates to the privileges and immunities clause). The prevailing approach is one of "selective incorporation." Thus far neither the third nor the seventh amendment has been applied to the states—nor has the grand jury clause of the fifth amendment or the excessive bail clause of the eighth. How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict.

Nordyke asked whether the right to keep and bear arms is "deeply rooted in this nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). It gave an affirmative answer. Suppose the same question were asked about civil jury trials. That institution also has deep roots, yet the Supreme Court has not held that the

states are bound by the seventh amendment. Meanwhile the Court's holding that double-jeopardy doctrine is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (concluding that it is enough for the state to use res judicata to block relitigation of acquittals), was overruled in an opinion that paid little heed to history. *Benton v. Maryland*, 395 U.S. 784 (1969). "Selective incorporation" thus cannot be reduced to a formula.

Plaintiffs' reliance on William Blackstone, 1 *Commentaries on the Laws of England* *123–24, for the proposition that the right to keep and bear arms is "deeply rooted" not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a *political* rather than a *constitutional* right. The United Kingdom does not have a constitution that prevents Parliament and the Queen from matching laws to current social and economic circumstances, as the people and their representatives understand them. It is dangerous to rely on Blackstone (or for that matter modern European laws banning handguns) to show the meaning of a constitutional amendment that this nation adopted in 1868. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution*, 59 Stan. L. Rev. 1281 (2007). Blackstone also thought determinate criminal sentences (*e.g.*, 25 years, neither more nor less, for robbing a post office) a vital guarantee of liberty. 4 *Commentaries* *371–72. That's not a plausible description of American constitutional law.

One function of the second amendment is to prevent the national government from interfering with state militias. It

does this by creating individual rights, *Heller* holds, but those rights may take a different shape when asserted against a state than against the national government. Suppose Wisconsin were to decide that private ownership of long guns, but not handguns, would best serve the public interest in an effective militia; it is not clear that such a decision would be antithetical to a decision made in 1868. (The fourteenth amendment was ratified in 1868, making that rather than 1793 the important year for determining what rules must be applied to the states.) Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the second amendment protects only the interests of law-abiding citizens. See *United States v. Jackson*, 555 F.3d 635 (7th Cir. 2009) (no constitutional right to have guns ready to hand when distributing illegal drugs).

Our hypothetical is not as farfetched as it sounds. Self-defense is a common-law gloss on criminal statutes, a defense that many states have modified by requiring people to retreat when possible, and to use non-lethal force when retreat is not possible. Wayne R. LaFave, 2 *Substantive Criminal Law* §10.4 (2d ed. 2003). An obligation to avoid lethal force in self-defense might imply an obligation to use pepper spray rather than handguns. A modification of the self-defense defense may or may not be in the best interest of public safety—whether guns deter or facilitate crime is

an empirical question, compare John R. Lott, Jr., *More Guns, Less Crime* (2d ed. 2000), with Paul H. Rubin & Hashem Dzehbakhsh, *The effect of concealed handgun laws on crime*, 23 International Rev. L. & Econ. 199 (2003), and Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086 (2001)—but it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868. The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate. See *Clark v. Arizona*, 548 U.S. 735 (2006) (state may reformulate, and effectively abolish, insanity defense); *Martin v. Ohio*, 480 U.S. 228 (1987) (state may assign to defendant the burden of raising, and proving, self-defense).

Chicago and Oak Park are poorly placed to make these arguments. After all, Illinois has *not* abolished self-defense and has *not* expressed a preference for long guns over handguns. But the municipalities can, and do, stress another of the themes in the debate over incorporation of the Bill of Rights: That the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *Crist v. Bretz*, 437 U.S. 28, 40–53 (1978) (Powell, J., dissenting) (arguing that only "fundamental" liberties

should be incorporated, and that even for incorporated amendments the state and federal rules may differ); Robert Nozick, *Anarchy, State, and Utopia* (1974). Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon. How arguments of this kind will affect proposals to "incorporate" the second amendment are for the Justices rather than a court of appeals.

AFFIRMED

Enclosure #2

ANTICIPATING SECOND AMENDMENT INCORPORATION: THE ROLE OF THE INFERIOR COURTS

Nelson Lund†

CONTENTS

INTRODUCTION

In *District of Columbia v. Heller*, the Supreme Court finally decided that the Second Amendment really does protect the right of the people to keep and bear arms, and that this includes at least the right to keep a handgun in the home for self defense.[1] Understandably, all eyes have turned to the next logical question. Is the right to arms protected only from federal infringement, as in *Heller*, or is it also good against state and local governments? Test cases have already been filed challenging Chicago's handgun ban, which is similar to the regulation invalidated in *Heller*.[2] The "incorporation" issue—whether the Fourteenth Amendment protects the right to keep and bear arms from infringement by the states—may be virtually dispositive in the Chicago cases, and it will be a threshold issue in many others as well.

In *Heller*, the Justices were almost compelled to address the original meaning of the Second Amendment because there was virtually no relevant Supreme Court precedent to consider.[3] By way of contrast, there is a huge and

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1. 128 S. Ct. 2783, 2822 (2008).

2. Warren Richey, *Battle Over Gun Rights—Round 2*, CHRISTIAN SCI. MONITOR, Aug. 14, 2008, *available at* http://www.csmonitor.com/2008/0814/p01s05-usju.html.

3. For analysis of the precedent that did exist, see Nelson Lund, *Heller and Second*

complicated mass of case law dealing with "incorporation" of the Bill of Rights through the Fourteenth Amendment. The theory of incorporation that is best supported by the text and history of the Constitution is based on the Privileges or Immunities Clause, but that theory has not been accepted by the Court. The Court's theory of incorporation is based on substantive due process, but that theory is bereft of support in the Constitution's text and history.

Heller expressly reserved the incorporation issue.[4] After arguing that the opinion in the 1875 *Cruikshank* case[5] supported the conclusion that the Second Amendment protects more than a right to bear arms in a state militia, the *Heller* majority dropped this footnote:

> With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265 (1886) and *Miller v. Texas*, 153 U.S. 535, 538 (1894) reaffirmed that the Second Amendment applies only to the Federal Government.[6]

This footnote accurately notes that the Court's precedents seem to speak with different voices, but the footnote does not explore the relationship between these different lines of case law. When the Supreme Court next reviews the constitutionality of a state gun regulation, it will have several options, one of which is to overrule precedents that it concludes were erroneous. Before that happens, however, the inferior courts will first have to interpret those precedents. The Supreme Court has not authorized those courts to overrule its precedents, even when there are good reasons to think that the precedents were wrongly decided.[7]

This short essay reviews the principal precedents the lower courts will have to confront. Part I begins, as the *Heller* footnote suggests we should begin, with the *Cruikshank* line of cases. I conclude that the lower courts,

Amendment Precedent, 13 LEWIS & CLARK L. REV. (forthcoming May 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1235537

4. *See Heller*, 128 S. Ct. at 2813 n.23.

5. United States v. Cruikshank, 92 U.S. 542 (1875).

6. 128 S. Ct. at 2812-13 & n.23.

7. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237-38 (1997); Wallace v. Jaffree, 472 U.S. 38, 46-47 n.26 (1985). For purposes of this article, I largely leave aside a number of important and interesting questions, including the following: Should the lower courts be bound to respect Supreme Court precedent? Should Supreme Court decisions and opinions receive less deference from state courts than from the inferior federal courts? Are federal district courts situated differently with respect to precedent than federal courts of appeals? To what extent and in what way should lower courts distinguish holdings from dicta in Supreme Court opinions?

though not the Supreme Court, are probably barred by precedent from finding that the right to keep and bear arms is protected by the Fourteenth Amendment's Privileges or Immunities Clause. Part II shows that existing Supreme Court precedent points very strongly in favor of incorporation under substantive due process. Part III argues, on the basis of existing precedent, that the inferior courts need not wait for the Supreme Court to reach this conclusion. They can best perform their role in our hierarchical judicial system by treating the Supreme Court's modern incorporation jurisprudence as law. If they do, they should conclude that the right to keep and bear arms is protected against infringement by the state governments, just as it is protected against the federal government.

I. INCORPORATION THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE

The two cases most apparently on point are *United States v. Cruikshank*[8] and *Presser v. Illinois*.[9] Both cases properly relied on *Barron v. Baltimore* for the proposition that the Second Amendment itself, like the Bill of a Rights as a whole, applies only to the federal government.[10] But do they also hold that the right to arms is outside the protection of the Privileges or Immunities Clause of the Fourteenth Amendment?

A. Reading Cruikshank *and* Presser *Narrowly*

Cruikshank arose from a Reconstruction Era incident known to history as the Colfax Massacre, a gun battle that resulted in the killing of a large number of blacks who had gathered together for mutual protection from a white paramilitary group. The federal government prosecuted the white defendants under the Enforcement Act of 1870, which made it a crime for two or more persons to band or conspire together with intent to hinder or prevent a citizen in the "free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States."[11] The defendants were convicted on several counts, including two charges that specified intent to interfere with the right to keep and "bear[ ] arms for a lawful purpose."[12]

8. 92 U.S. 542 (1875).

9. 116 U.S. 252 (1886).

10. *See Cruikshank*, 92 U.S. at 552; *Presser*, 116 U.S. at 265 (both citing Barron v. Baltimore, 32 U.S. 243 (1833)). *Miller* also relied on *Barron*, and declined to address a Fourteenth Amendment incorporation claim on the ground that it had not been raised in the trial court. *See* Miller v. Texas, 153 U.S. 535, 538-39 (1894).

11. *Cruikshank*, 92 U.S. at 548 (citing Act of May 31, 1870, ch. 114, 16 Stat. 141 (codified as amended at 18 U.S.C. § 241 (2000))).

12. *Id.* at 553.

The Court held that these counts could not serve as a basis for indictment.[13] "This [i.e. the right to keep and bear arms for a lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."[14] The Second Amendment only means that *Congress* may not infringe the right, "leaving the people to look for their protection against any violation *by their fellow-citizens*" to the police power of the states, a power that was in this respect not removed from the state governments or delegated to the federal government.[15] Using a similar analysis, the Court also rejected those portions of the indictment charging that the defendants acted with the intent to deprive the victims "of their respective several lives and liberty of person without due process of law."[16] The Fourteenth Amendment's Due Process Clause, said the Court, "adds nothing to *the rights of one citizen as against another*. It simply furnishes an additional guaranty against any encroachment *by the States* upon the fundamental rights which belong to every citizen as a member of society."[17]

The *Cruikshank* case itself was thus not understood to involve what we now call "state action." If one focuses on the italicized portions of the quotations in the previous paragraph, one could read the opinion to leave open the possibility that the Privileges or Immunities Clause (which *Cruikshank* does not cite) forbids the state governments *themselves* from abridging the right of the people to keep and bear arms.[18]

Presser can also be read to leave this possibility open, though for different reasons. In this case, the Court upheld an Illinois statute that

13. *Id.*
14. *Id.*
15. *Id*. (emphasis added).
16. *Cruikshank*, 92 U.S. at 553.
17. *Id.* at 554 (emphasis added).
18. *Cf*. Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMM. 701, 709-15 (2000). For more elaborate presentations of the argument that *Cruikshank* was decided on state-action grounds, see STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 172-75 (1998); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1148-60 (2000). This reading may be strengthened by the way that the Court treated those counts in the indictment that seemed most clearly to allude to the Privileges or Immunities Clause. *See Cruikshank*, 92 U.S. 542 at 556-57 (discussing several counts that referenced "the rights, privileges, immunities, and protection" secured to the victims "as citizens of the United States," and "rights and privileges" secured to the victims "by the constitution and laws of the United States."). Rather than invoking what we would call the state-action doctrine, or considering what we would call the argument for incorporation, the Court held that these counts were not sufficiently specific to satisfy the Sixth Amendment. *See id.* at 557-58.

forbade bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.[19] On the authority of *Barron* and subsequent cases, including *Cruikshank*, the Court once again correctly held that the Second Amendment of its own force "has no other effect than to restrict the powers of the national government."[20]

Presser also rejected an argument that the statute violated the Privileges or Immunities Clause.[21] Citing *Cruikshank*, the Court held that this constitutional provision covers only those rights or privileges "expressly or by implication placed under [the federal government's] jurisdiction."[22] Because the Court could identify no provision of the Constitution or statutes of the United States conferring a right to form private military organizations, or to conduct private military drills, the Privileges or Immunities Clause was held to have no applicability.[23] The Court did not expressly consider, and therefore arguably did not reject, the proposition that the right to keep and bear arms protected by the Second Amendment is among the privileges or immunities "placed under the jurisdiction" of the federal government. The rejection of this proposition, one could argue, would be implicit in *Presser* only if the Court believed that the Second Amendment itself protects a right to form private military organizations. But this would be a far-fetched interpretation of the Second Amendment, and there is no indication in *Presser* that the Court made any such assumption.

B. The Slaughter-House *Problem*

The chief obstacle to adopting these narrow interpretations of *Cruikshank* and *Presser* is that both cases relied heavily and expressly on the *Slaughter-House Cases* for the general framework of their analysis.[24] That case *did* involve state action, and clearly held that the only rights protected by the Privileges or Immunities Clause are those that "ow[e] their existence to the Federal government, its National character, its Constitution, or its laws."[25] Thus, when *Cruikshank* declared that the right to bear arms for a lawful purpose "is not a right granted by the

19. *Presser*, 116 U.S. at 253-54, 269.
20. *Id.* at 265 (citing *Cruikshank*, 92 U.S. at 553; Barron v. Baltimore, 32 U.S. 243 (1833)).
21. *Id.* at 266-67.
22. *Id.* at 266 (citing and quoting *Cruikshank*, 92 U.S. at 550).
23. *Id.* at 267.
24. *See Cruikshank*, 92 U.S. at 549 (citing 83 U.S. 36 (1872)).
25. *Slaughter-House Cases*, 83 U.S. at 79.

Constitution," it is highly unlikely that the Court could have meant that *Slaughter-House* left open the possibility that the right *is* protected against state action even though Congress may not protect it against the kind of private conspiracies at issue in *Cruikshank*.[26] Similarly, *Presser*'s conclusion (quoting *Cruikshank*) that the right at issue is not "expressly or by implication placed under [the federal government's] jurisdiction" cannot very plausibly be limited to the peculiar subset of arms bearing at issue in that case.[27]

It is possible, as some commentators have argued, that *Slaughter-House*, and maybe even *Cruikshank*, left open the possibility of incorporation under the Privileges or Immunities Clause.[28] But that is not how the cases have been read in subsequent Supreme Court opinions.[29] The Court's interpretation of the Privileges or Immunities Clause has been widely criticized, and serious arguments have been made for interpreting the Privileges or Immunities Clause to protect at least the personal, individual rights listed in the Constitution's first eight amendments.[30] A strong case can be made for reconsidering the original

26. *Cruikshank*, 92 U.S. at 553.

27. *Presser*, 116 U.S. at 266 (citing and quoting *Cruikshank*, 92 U.S. at 550).

28. *See* Earl M. Maltz, *The Concept of Incorporation*, 33 U. RICH. L. REV. 525, 525-31 (1999) (*Slaughter-House* but not *Cruikshank*); Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 648, 714-20 (2000) (both *Slaughter-House* and *Cruikshank*); Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 739 (1984) (*Slaughter-House* but not *Cruikshank*); Wildenthal, *supra* note 18, at 1063-66, 1148-60 (*Slaughter-House* but not *Cruikshank*).

For an argument that *Slaughter-House* deliberately paved the way for *Cruikshank*'s rejection of Second Amendment incorporation, because the Court wanted to preserve to the states the option of disarming white opponents of black equality in the South, see generally Leslie Friedman Goldstein, *The Second Amendment, the* Slaughter-House Cases *(1873), and* United States v. Cruikshank *(1876)*, 1 ALB. GOV'T. L. REV. 365 (2008).

29. *See, e.g.*, Maxwell v. Dow, 176 U.S. 581, 587-97 (1900), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970); Twining v. New Jersey, 211 U.S. 78, 93-99 (1908), *overruled in part on other grounds*, Malloy v. Hogan, 378 U.S. 1 (1964); Adamson v. California, 332 U.S. 46, 51-53 (1947), *overruled in part on other grounds*, Malloy v. Hogan, 378 U.S. 1 (1964).

30. For somewhat different approaches, with somewhat different conclusions, see, for example, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 215-30 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 171-220 (1986); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 113-18 (1990); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 96-104 (1993); Wildenthal, *supra* note 18, at 1151-78; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1589-1625 (2007).

For analyses that focus especially on the right to keep and bear arms, see HALBROOK,

meaning of the Privileges or Immunities Clause in an appropriate case, as Justice Thomas has proposed.[31] And if the Court becomes sufficiently serious about employing the kind of original-meaning jurisprudence that was on conspicuous display in *Heller*'s discussion of the text of the Second Amendment, it may be willing to undertake that reconsideration in a Second Amendment case.[32]

I agree with Justice Thomas, and I think a Second Amendment case would provide a suitable vehicle for revisiting the original meaning of the Privileges or Immunities Clause. But whether or not the Supreme Court ever proves willing to take this step, I doubt that it would be proper for the inferior courts to do so. *Cruikshank* and *Presser* may not absolutely and unambiguously foreclose incorporation of the right to arms under that clause, but they at least come very close to doing so. The Supreme Court, moreover, has consistently assumed that incorporation of the guarantees listed in the Bill of Rights may not proceed under the Privileges or Immunities Clause. The lower courts, it seems to me, are stuck with that result until the Supreme Court changes course.

II. INCORPORATION THROUGH SUBSTANTIVE DUE PROCESS

Cruikshank and *Presser* correctly held that the Second Amendment itself does not apply to the states.[33] These cases also seem to tell the inferior courts that the right to keep and bear arms is not among the rights

supra note 18, at 160-75, 183-96; Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 41-42, 50-51, 56-72 (2007).

For more skeptical views of the evidence supporting this interpretation of the Privileges or Immunities Clause, see, for example, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 134-56 (1977); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 110-23 (1988); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1646-57 (2007); Lawrence Rosenthal, *Second Amendment Plumbing after* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs* 66-82 (Chapman Univ. School of Law Research Paper No. 08-302, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1245402 (click "Download" hyperlink; then choose Location to download the Paper).

31. Saenz v. Roe, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting).

32. For an elaborate analysis, including a discussion of certain advantages that might arise from proceeding under the Privileges or Immunities Clause rather than under due process, see Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause* (forthcoming 2009) (on file with the *Syracuse Law Review* and *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1143851).

33. *See supra* Part I.A.

covered by the Privileges or Immunities Clause of the Fourteenth Amendment. Neither case, however, nor any other Supreme Court decision, has even considered whether this right is protected under the modern doctrine of substantive due process.[34]

As is well known, most of the rights listed in the Bill of Rights have been applied against the state governments under the aegis of substantive due process, through what is now called "selective incorporation."[35] This has been an odd undertaking. First, the Court has never so much as attempted to reconcile selective incorporation, or any of its many other substantive due process decisions, with the text of the Constitution. And if it tried to do so, it would probably fail.[36] Second, the Court's important early decisions—holding that certain rights protected against the federal government by the Bill of Rights were also protected against the state governments by the Due Process Clause—were based on little more than unreasoned and unelaborated pronouncements.[37] Third, as I will explain briefly below, the Court has never developed a legal test that provides a coherent way of explaining all of its incorporation decisions.

Confronted with this doctrinal miasma, one might conclude that the inferior courts should just leave it up to the Supreme Court to decide whether or when to protect the right to keep and bear arms through

34. When *Cruikshank* discussed due process, it addressed only the state action issue. *See Cruikshank*, 92 U.S. at 553-54. *Presser* dismissed claims based on due process, as well as on bill of attainder and ex post facto grounds, as "so clearly untenable as to require no discussion." *Presser*, 116 U.S. at 268. If one reads this as a general rejection of the doctrine of substantive due process, which is what it appears to be, it has already been overruled by many twentieth century Supreme Court decisions.

35. The process is called "selective" because it has proceeded incrementally and because the Court has rejected incorporation of the Seventh Amendment right to a civil jury and the Fifth Amendment right to a grand jury indictment. *See* Mayes v. Ellis, 409 U.S. 943, 943 (1972), *aff'g* Melancon v. McKeithen, 345 F. Supp. 1025 (E.D.La. 1972); Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

36. *See, e.g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557-73 (2004); *see generally* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

37. *See, e.g.*, Chicago, B. & Q. R. v. Chicago, 166 U.S. 226, 236 (1897):

> [I]f, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen.

See also Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming in dicta that due process protects freedoms of speech and press from state interference); Stromberg v. California, 283 U.S. 359, 368 (1931) (relying on prior dicta to hold that due process disallows state law infringing freedom of speech).

substantive due process. This is exactly what the lower courts have done.[38] Whatever other justifications there may have been for this timidity, the Supreme Court's incorporation jurisprudence is not so confused as to make it impossible—or even particularly difficult—for the lower courts to apply it to the right to arms.

To see why, it is important to note at the outset that *Barron v. Baltimore* has never been overruled. Technically, it remains true that none of the various provisions of the Bill of Rights apply to the states. Some of the same *rights* listed in the first eight amendments are protected by the Fourteenth Amendment's Due Process Clause, but those amendments themselves still apply only to the federal government. This was clear in the Court's early incorporation decisions, which did not distinguish between "incorporation" and substantive due process more generally.[39] When the Court began issuing decisions declining to find any difference between the rights that are protected by both the Bill of Rights and by due process,[40] it naturally became common to say things like, "The First Amendment forbids Texas to outlaw desecration of the flag." This is shorthand that everyone now employs; but it is still only shorthand. Technically, it is the Due Process Clause of the Fourteenth Amendment, not the First Amendment as such, that forbids Texas to outlaw flag desecration.

If there is a general description of the rights protected by substantive due process, it is those rights that the Court regards as "fundamental." The most demanding test of fundamentality articulated by the Court in the incorporation context was adopted in *Palko v. Connecticut*, where the Court said that the test is whether a particular immunity is "implicit in the concept of ordered liberty," meaning that the immunity must be "of the very essence of a scheme of ordered liberty."[41] The Court offered an example from the First Amendment: freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[42]

38. *E.g.*, Bach v. Pataki, 408 F.3d 75, 85-86 (2d Cir. 2005) (invoking *Presser*); Love v. Pepersack, 47 F.3d 120, 123-24 (4th Cir. 1995) (invoking *Cruikshank* and *Presser*); Fresno Rifle and Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 730 (9th Cir. 1992) (invoking *Cruikshank* and *Presser*); Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982) (invoking *Presser*); Cases v. United States, 131 F.2d 916, 921-22 (1st Cir. 1942) (invoking *Cruikshank* and *Presser*).

39. *See, e.g.*, *Chicago, B. & Q. R. Co.*, 166 U.S. at 236; *Stromberg*, 283 U.S. at 368.

40. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 406 (1965); Malloy v. Hogan, 378 U.S. 1, 6 (1964); Ker v. California, 374 U.S. 23, 30-31 (1963). The one odd exception is the unanimity requirement for criminal jury verdicts, which is imposed on the federal government by the Sixth Amendment, but not on the states by due process. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972).

41. 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

42. *Id*. at 326-27.

Under this most stringent of standards, the text of the Constitution itself demands the incorporation of Second Amendment rights. The Second Amendment, unlike any other provision of the Bill of Rights, includes a prefatory phrase expressing its sense of the fundamental importance of the Amendment. Moreover, that phrase contains language whose meaning is virtually identical to that of the language in the *Palko* incorporation test: the Supreme Court's reference to those rights that are "of the very essence of a scheme of ordered liberty" is nothing but a slightly reworded version of the Second Amendment's reference to what is "necessary to the security of a free State."[43] It is as though the Court had taken its legal test for incorporation directly from the Second Amendment itself, and this stunning similarity gives the right to arms a much stronger textual claim to being "fundamental" in the Court's stated sense of the term than any other right listed in the Bill of Rights.[44]

It is, of course, quite possible to conceive of a scheme of ordered liberty that does not include the right to keep and bear arms. But it is at least as easy to conceive of such a scheme that does not include anything like our right of free speech.[45] If the *Palko* test requires incorporation of the right of free speech, as *Palko* said it does, the text of the Second Amendment therefore requires that the right to keep and bear arms must be incorporated under the same test.

It might be unrealistic to expect the courts to take such a textual argument seriously. But one need not rely on this argument because the Court itself eventually recognized that the *Palko* test was too stringent. *Duncan v. Louisiana* jettisoned *Palko*'s insistence that a right be *essential* to a scheme of ordered liberty, and replaced it with a requirement that the right be "necessary to an Anglo-American regime of ordered liberty."[46]

43. *See* U.S. CONST. amend. II.

44. It is, of course, a well regulated militia that the Second Amendment says is necessary to the security of a free state. *Id.* That, however, does not detract from the fact that the constitutional text identifies the security of a free state as the purpose served both by a well regulated militia and by the constitutional protection extended to the right of the people to keep and bear arms.

45. *Palko* said that the Court's incorporation decisions were "dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." *Palko*, 302 U.S. at 326. The Court itself later overruled the holding in *Palko*, thus throwing doubt on its earlier studies of "liberty itself." Benton v. Maryland, 395 U.S. 784, 794 (1969). In any event, it is not by any means self evident that the freedom of thought and speech protected by the First Amendment "is the matrix, the indispensable condition, of nearly every other form of freedom." *See generally*, *e.g.*, PLATO, THE LAWS OF PLATO (Thomas L. Pangle trans., Basic Books 1980); JEAN-JACQUES ROUSSEAU, POLITICS AND THE ARTS (Allan Bloom trans., Cornell Univ. Press 1960) (1758).

46. 391 U.S. 145, 149 n.14 (1968).

This alteration of the standard was articulated in the realm of criminal procedure, but the Court did not suggest that some different standard would apply elsewhere. Thus, *Duncan* merely adjusted the *Palko* test by adopting an historical rather than philosophic or speculative mode of deciding what rights are "necessary" to our scheme of ordered liberty.[47]

The right to arms unquestionably meets this revised test. Like the right to a jury trial in criminal cases, which was at issue in *Duncan* itself, "[i]ts preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689."[48] And, like the right to a criminal jury, the right to arms "came to America with English colonists, and received strong support from them."[49] When the Second Amendment was adopted, almost half of the states with bills of rights included provisions protecting the right to arms, and no state sought to deny that right to its citizenry.[50] Even today, forty-four states have constitutional provisions expressly protecting a right to arms, and no jurisdiction has attempted to ban guns completely.[51] The right protected by the Second Amendment meets the Court's test of what is "fundamental" far more easily than other rights that have already been incorporated, some of which were never even included in the fundamental documents of the English Constitution.[52]

Finally, *Heller* itself comes very close to characterizing the right to arms as a fundamental right in the *Duncan* sense of the term. In the course of arguing that the right to arms in the English Bill of Rights was "an

47. In an opinion by Judge John Minor Wisdom, a three-judge district court applied *Duncan* outside the context of criminal procedure, holding that substantive due process does not require incorporation of the Seventh Amendment right to a civil jury. *Melancon*, 345 F. Supp. at 1027, *aff'd sub nom.* Mayes v. Ellis, 409 U.S. 943 (1972).

48. *Duncan*, 391 U.S. at 151 (referring to trial by jury in criminal cases). The 1689 Declaration and Bill of Rights states "[t]hat the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.), *available at* http://www.statutelaw.gov.uk/ (search for the Title "Bill of Rights" and Year "1688"; follow "Bill of Rights" hyperlink; then follow "Bill of Rights c.2." hyperlink).

49. *Duncan*, 391 U.S. at 152.

50. *See* Donald S. Lutz, *The States and the U.S. Bills of Rights*, 16 S. ILL. U. L.J. 251, 259-260 tbl.3 (1992).

51. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205 (2006).

52. Conspicuous examples include the religious rights protected by the First Amendment, the First Amendment rights of speech and press, the Fifth Amendment prohibition against uncompensated takings of private property, and several of the Fifth and Sixth Amendment rights of the criminally accused. *See* Lutz, *supra* note 50, at 253 tbl.1 (listing documents that first protected Bill of Rights guarantees).

individual right protecting against both public and private violence," *Heller* emphasizes that this was "one of the fundamental rights of Englishmen."[53] *Heller* also stresses that the "*inherent* right of self-defense has been central to the Second Amendment right," which explains why the right to arms must be "fundamental" in the sense articulated in *Duncan*'s incorporation test.[54] Thus, if one purports to take the Supreme Court's incorporation jurisprudence seriously as law—as the inferior courts are required to do—one can hardly escape the conclusion that the Fourteenth Amendment protects the right of the people to keep and bear arms against action by the states, just as the Second Amendment protects that right against the federal government.

III. ANTICIPATING THE SUPREME COURT

Notwithstanding the availability of strong, precedent-based arguments for incorporating the Second Amendment right, the inferior courts have consistently refused to take this step. Maybe this was because the Supreme Court had never indicated that the Second Amendment was even a serious constraint on the federal government. That justification obviously does not survive *Heller*. Or perhaps the lower courts believed that the Supreme Court has reserved to itself the privilege of engaging in the Fourteenth Amendment analysis that *Heller* said is required by the modern cases.[55] But the Supreme Court has said no such thing. There is no legal requirement that lower courts "wait" for the Supreme Court to apply the *Duncan* due process test to the right to keep and bear arms.

In other contexts, moreover, the lower courts have already "anticipated" Supreme Court decisions incorporating provisions of the Bill of Rights. An illuminating example came in 1965, when the Second Circuit was presented with a habeas petition raising a double jeopardy claim.[56] In simplified form, the facts were as follows. The defendant had been convicted of first degree murder in a trial at which the jury had been given the option of convicting him on that charge or on one of several lesser homicide charges.[57] He appealed and the conviction was reversed on procedural grounds.[58] The defendant was tried again under the same indictment, and again convicted of first degree murder.[59] He appealed, and

53. *Heller*, 128 S. Ct. at 2798-99.
54. *Id*. at 2817 (emphasis added).
55. *Id*. at 2813 n.23.
56. United States *ex rel*. Hetenyi v. Wilkins, 348 F.2d 844, 846 (2d Cir. 1965).
57. *Id*. at 847.
58. *Id*.
59. *Id*. at 847-48.

this conviction was also reversed on procedural grounds.[60] In a third trial, on the same indictment, the defendant was convicted of second degree murder.[61]

The Second Circuit concluded that it violated the Due Process Clause to reprosecute the defendant for first degree murder after the first conviction was reversed.[62] The court then held that it was also unconstitutional to convict him of second degree murder in the third trial because that trial was based on an indictment that included the charge of first degree murder.[63] Although it would have been permissible for the state to reprosecute him for second degree murder after the first trial, the court reasoned that there was a reasonable possibility that the jury in the third trial had been prejudiced by the inclusion of the first degree murder charge in the indictment.[64]

The obstacles to reaching this result were seemingly enormous. As the court noted, the Supreme Court had never invalidated any state-court conviction on the ground that it violated federal constitutional limitations on reprosecution.[65] Furthermore, *Palko* (which had not yet been overruled) had sustained a conviction in a seemingly more egregious case, where the defendant's second degree murder conviction had been reversed and he was reprosecuted for first degree murder.[66] Finally, the Supreme Court had twice upheld state convictions in which the pattern of reprosecutions had been identical to the pattern in the case that was now before the Second Circuit.[67]

The Second Circuit distinguished *Palko* on the ground that the reversal of the first conviction in that case had come in an appeal by the prosecution, not in an appeal by the defendant.[68] But what about the two Supreme Court decisions that could not be distinguished because they involved identical procedural facts? And what about the absence of any Supreme Court decisions overturning a state-court conviction on the ground that it involved an unconstitutional reprosecution?

In a lengthy and complex analysis, the Second Circuit argued that recent Supreme Court opinions dealing with "selective incorporation" and

60. *Id.* at 848.
61. *Id.*
62. *Id.* at 857-58.
63. *Id.*
64. *Id.* at 858 & n.20, 864.
65. *Id.* at 850.
66. *See id.* at 851.
67. *Id.* at 861 (citing Kring v. Missouri, 107 U.S. 221 (1882); Brantley v. Georgia, 217 U.S. 284 (1910)).
68. *Id.* at 860.

"fundamental fairness," none of which was directly on point, had vitiated the authority of all the older and arguably dispositive precedents.[69] A dissenting member of the panel made the obvious rejoinder. After conceding that recent Supreme Court incorporation decisions might well presage the announcement of a new Fourteenth Amendment double jeopardy rule, that judge said: "However, the incorporation of guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment at the expense of departing from several long-standing Supreme Court decisions is a step which should only be taken by that Court."[70]

The Supreme Court declined to endorse the dissenting judge's understanding of how incorporation doctrine is required to develop. First, the Supreme Court denied a petition for certiorari in this case, thus refusing to disapprove the Second Circuit's approach.[71] Later, and more significantly, the Supreme Court went out of its way to cite the Second Circuit's majority opinion with approval in a unanimous double jeopardy case.[72]

I have chosen to discuss the Second Circuit opinion, which was written by Thurgood Marshall, because it is carefully reasoned and respectful, in a lawyerly way, of seemingly adverse Supreme Court precedents. But it is not unique. Other circuits have also anticipated Supreme Court incorporation decisions, and in a much more cavalier manner.[73] And even they were not rebuked.

69. *Id*. at 853-57.

70. *Id.* at 868 (Metzner, J., dissenting).

71. *See* Mancusi v. Hetenyi, 383 U.S. 913, 913 (denying certiorari).

72. *See* Price v. Georgia, 398 U.S. 323, 331-32 (1970) (opinion for the Court by Chief Justice Burger). By the time this case was decided, *Palko* had been overruled. The Court cited the Second Circuit for the proposition that when a jury is given the option of convicting on either a more serious or a less serious charge, it might be induced to convict on the less serious charge rather than continue to debate the defendant's guilt or innocence. *Id.*

73. One example is United States *ex rel*. Bennett v. Rundle, which treated the Sixth Amendment right to a public trial as applicable to the states, notwithstanding *Gaines v. Washington*, which held to the contrary. 419 F.2d 599, 603 (3rd Cir. 1969) (discussing 277 U.S. 81, 85 (1928)). The *Rundle* court noted that *Gaines* had "never been overruled explicitly," but argued that comments in various other opinions suggested that it was no longer good law. *Id.* The Supreme Court denied a petition for certiorari in *Rundle*. 409 U.S. 916, 916 (1972). The Court also twice cited the Third Circuit's opinion with approval in *Waller v. Georgia*. *See* 467 U.S. 39, 46, 49 n.9 (1984) (citing *Rundle*, 419 F.2d at 606, 608). Another example is United States *ex rel.* Latimore *v.* Sielaff. 561 F.2d 691, 693 n.2 (7th Cir. 1977). Here, the court did not even acknowledge *Gaines* or provide any analysis at all, but just dropped a footnote citing two Supreme Court decisions that were not on point, as well as the Third Circuit's decision in *Rundle*. *Id.* The Court also denied a petition for certiorari in *Latimore*. 434 U.S. 1076, 1076 (1978). The Supreme Court, of course, did

In 1965—before *Palko* had been overruled and while the Court's incorporation jurisprudence was more unsettled than it is now—then-Judge Marshall had to perform some fairly elaborate legal gymnastics in order to justify a decision effectively anticipating Supreme Court decisions that were yet to come. Today—and especially after the *Heller* decision—it would be much, much easier for a lower court to explain why the Supreme Court's incorporation jurisprudence clearly indicates that the Fourteenth Amendment protects the right to keep and bear arms against infringement by the state governments.

Neither *Cruikshank* nor *Presser* considered, and should not be read to have rejected, incorporation arguments based on substantive due process. Indeed, they could not possibly have considered or rejected the novel and elaborate version of substantive due process that the Court developed in its twentieth century incorporation cases. The inferior courts are not obliged to pretend that they would be "overruling" *Cruikshank* and *Presser* by undertaking an analysis that the Supreme Court has said is now "required."[74] And the Supreme Court is not entitled to reserve to itself the application of precedents that it insists be treated as law by other courts.

The true obligation of the inferior courts is to take the Supreme Court's incorporation jurisprudence seriously. If they issue well-reasoned opinions applying that jurisprudence, they will assist the Supreme Court when it faces the issue of Second Amendment incorporation directly, as the Court inevitably must. Such well-reasoned opinions will surely conclude that the right to keep and bear arms is protected from infringement by the state governments, just as it is protected against the federal government.

eventually overrule *Gaines*, though it did not bother to do so expressly. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 379 (1979).

74. *Heller*, 128 S. Ct. at 2813 n.23.

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